

IN THE

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Supreme Court of the United States

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October Term, 1945.

No. **976**

JACOB R. STEIN, charged as Jack R. Stein,

Petitioner,

vs.

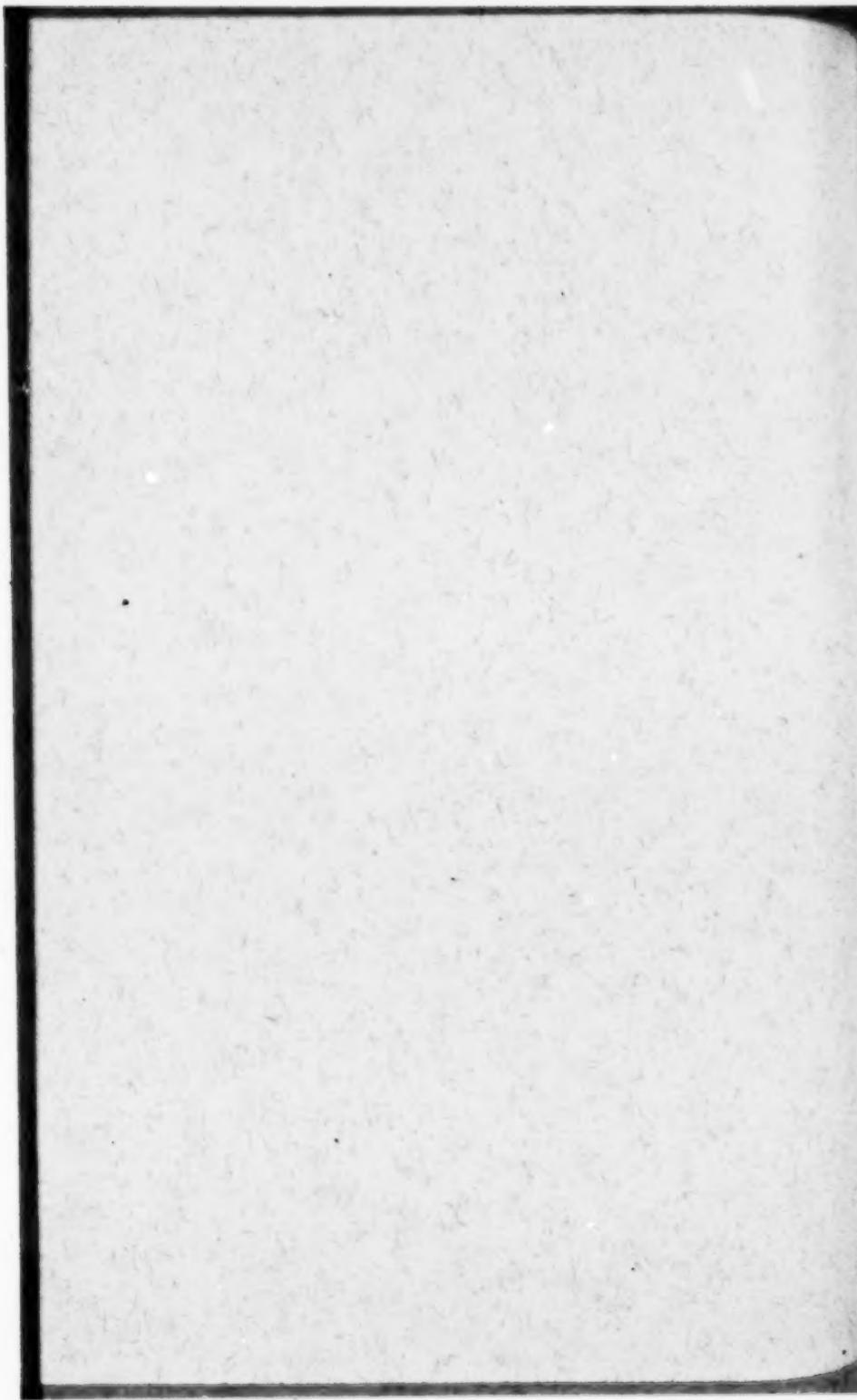
UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

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UNITED STATES OF AMERICA,

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**PETITION FOR WRIT OF CERTIORARI TO
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OF APPEALS FOR THE NINTH CIRCUIT.**

The above named Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on February 18, 1946. Said Judgment affirmed the judgments and sentences of the United States District Court for the Southern District of California, Central Division, as to Counts 2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14 of the Amended Information, and reversed the judgments and sentences as to Counts 15, 16 and 17.

Introductory Statement.

Petitioner¹ was charged in an Information and thereafter by Amended Information, in seventeen Counts, with alleged violations of the Second War Powers Act.² Upon motion of the Government, Counts 4 and 11 of the Amended Information were dismissed before trial.

Pursuant to that Act, the President, through delegated authority to administrative heads of the War Production Board,³ issued numerous orders. One of those orders, War Production Board General Preference Order M-9-a,⁴ was endorsed on the Information and the Amended Information. This Act made the wilful violation of a WPB order a criminal offense.⁵

Upon trial the defendant, by verdict of the Jury, was found not guilty of Count 1 of the Amended Information, and found guilty as charged of Counts 2, 3, 5, 6, 7, 8,

¹Petitioner was the defendant and appellant and is herein sometimes referred to as "Stein."

²The Second War Powers Act is herein sometimes referred to as "Act." (Public Law 507, 77th Congress, Chapter 199, 2nd session; 56 Stat. 177; 50 U. S. C. A. Appendix, Sec. 633.)

³War Production Board, sometimes herein referred to as WPB."

⁴WPB General Preference Order M-9-a (7 FR 5980, 8825) sometimes herein referred to as "M-9-a."

⁵Section (5) of the Second War Powers Act provides, in addition to certain civil remedies for enforcement provided in Section (6), for criminal punishment for violation of any rule, regulation or order promulgated pursuant thereto, as follows:

"(5) Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both."

9, 10, 12, 13, 14, 15, 16 and 17. Upon appeal from the District Court, the Circuit Court of Appeals for the Ninth Circuit filed an Opinion June 30, 1945,⁶ reversing the judgments as to all Counts. Upon Appellee's petition for rehearing, the Circuit Court of Appeals, by its Opinion filed February 18, 1946,⁷ affirmed the judgments and commitments as to Counts 2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14, and reversed the judgments as to Counts 15, 16 and 17.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 18, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347).

Questions Presented.

Stein was convicted on an Amended Information in seventeen Counts, charging violations of the Second War Powers Act, specifically alleging wilful violations of M-9-a issued pursuant thereto.

The Government dismissed two of the Counts before trial, and the trial proceeded as to fifteen of the Counts. The Jury found the defendant not guilty of the first Count and guilty as to the remaining fourteen. The Court sentenced Stein to one year's imprisonment on each count, to

⁶This Opinion is herein referred to as "First Opinion." It is not reported and is printed as Appendix "A" of this Petition.

⁷This Opinion is herein referred to as "Second Opinion." It is not yet reported and is set forth in the Transcript of Record filed on this application [R. 345].

run concurrently, and assessed a fine of \$25,000. The Circuit Court of Appeals in its First Opinion, reversed the conviction on all Counts. In its Second Opinion, the Circuit Court reversed the conviction as to three Counts and affirmed as to the remaining eleven.

The offenses charged related to a series of transactions, to wit, certain sales and delivery of insulated copper wire which the Government claimed constituted violations of WPB Order M-9-a.

The questions presented are:

- (1) Whether the WPB regulations with respect to the sale and delivery of copper wire, including General Preference Order M-9-a, upon which the conviction was founded, were sufficiently certain and definite to constitute a valid basis for a criminal prosecution so as to constitute due process under the Constitution.
- (2) Whether the conviction was founded on the provisions of an applicable regulation governing the sale and delivery of insulated copper wire in the transactions involved in the prosecution.
- (3) Whether a conviction founded upon an Amended Information charging elements of an offense revoked prior to the alleged acts of the defendant, is a violation of due process of law.
- (4) Whether a conviction founded upon a jury charge defining the crime in such a way as to contain revoked elements of said offense, is a violation of due process of law.
- (5) Whether the evidence supports and constitutes proof sufficient to uphold a conviction for "wilful" violation of the Second War Powers Act.

(6) Whether the burden is upon the defendant to prove lack of "wilfulness," as in effect held by the Second Opinion of the Circuit Court of Appeals, where wilfulness is made a statutory element of the offense.

(7) Whether a verdict finding the defendant not guilty of one count and guilty of other counts of the Amended Information, is valid to support a judgment of conviction where as here all of the substantive acts were admitted by the defendant upon the trial, and the only issue of fact presented to the jury was the element of wilfulness required by the Act.

Dependent upon the answer to these major questions are presented the incidental questions as to—

- (a) Whether the Court should have directed a verdict in favor of the defendant.
- (b) Whether the jury was properly instructed as to the law.
- (c) Whether the Court should have granted defendant's motion in arrest of judgment.
- (d) Whether the Court should have granted a new trial.
- (e) Whether the holding of the majority of the Court in *Dunn v. Illinois*, 284 U. S. 390 (1932), should be modified.

Statutes and Regulations Directly Involved.

The pertinent provisions of the Second War Powers Act (Public Law 507, 77th Congress, Chapter 199, 2nd session; 56 Stat. 177; 50 U. S. C. A. Appendix, Sec. 633), are set forth in Appendix B. The War Production Board General Preference Order M-9-a, as amended October 30, 1942 (7 FR 5980, 8825), is set forth in Appendix C.

Statement of the Case.

A. INTRODUCTORY.

This case involves prosecution for alleged violation of a WPB regulation in selling and delivering insulated copper wire. The acts complained of occurred when this Country was at the height of its production of war material. At the time of the alleged offenses, it can be estimated that there were in excess of five hundred different regulations of the WPB. The regulations were in constant state of change. New regulations were frequently issued, existing regulations were revised, amended and sometimes revoked. Any one engaged in commercial activity involving a number of different commodities was, as in the case of Stein, subject to a varying number of these and other wartime regulations.

The authority for the issuance of orders and regulations and the criminal sanction for violations thereof, is contained in the Second War Powers Act.

The facts of the case give rise to two principal inquiries. The *first* inquiry arises out of the regulations themselves—whether the regulations were sufficiently certain and definite to ground a prosecution, and whether the charges against Stein were based on regulations in existence at the time when the offenses were alleged to have been committed. The *second* inquiry arises out of the statutory requirement that the violation to be criminal must be "wilful"—whether the government sustained its burden of proof of Stein's criminal intent in consummating the acts complained of, is an issue squarely presented.

This case in no sense involves any "black market" transactions. Nothing was done "under the table." All of the transactions involved, indeed all of the sales by peti-

tioner of the copper wire in question, were made in the ordinary course of business, with full and complete records kept of each transaction.

B. THE FACTS.

Petitioner Stein organized and was sales manager of the Western Sales and Supply Company of Los Angeles, California, which company was set up to deal in and distribute aluminum and aircraft parts, but later handled salvage and other materials [R. 206].

In August, 1942, Lockheed Aircraft Corporation* in Glendale, California, had in its possession and desired to dispose of an inventory of surplus materials consisting of a number of items and materials, including approximately 668,000 feet of insulated copper wire [R. 70, 72]. The materials had become "surplus" and obsolete by reason of engineering changes in the building of aircraft in which Lockheed was engaged. The copper wire was unusable by Lockheed or any other airplane company in the United States [R. 73]. Lockheed made numerous attempts during a period of ten months without success to dispose of the surplus inventory [R. 74].

Commencing in 1942, Mr. Taylor, representing Lockheed, negotiated with Stein for Stein's purchase of the surplus materials. There was a general discussion between Taylor and Stein relative to the difficulties resulting from Government directives and orders governing the control of the material being purchased, and both parties were unable to determine whether compliance was re-

*Lockheed Aircraft Corporation is herein referred to as "Lockheed."

quired with WPB regulations, or orders of the Army Air Force [R. 75, 172].

Stein not having had any prior experience with the class of materials purchased from Lockheed, employed an individual (the witness, Harry Cowan) who had formerly been employed by Vega Aircraft Corporation and who had a knowledge of these materials, to analyze, catalogue and assist in the distribution of these various items [R. 208, 194, 211].

The copper wire was a very small portion of the material purchased from Lockheed—less than five per cent.

The material was catalogued, an inventory was printed and sent by Stein to firms and Government agencies, including WPB, Army Air Forces, and Aircraft Scheduling Unit [R. 190]. With the catalogue went a covering letter offering the merchandise for sale, written by Stein, which included a paragraph reading:

"Priority Regulations must be complied with in full. We reserve the right to submit all orders to War Production Board for approval before shipping." [R. 212; Gov. Ex. 7-A, R. 331.]

The catalogue also went to the office of the Army Air Forces, Western Procurement District office in Los Angeles, which was engaged in exercising control and routing of essential materials in the Los Angeles Metropolitan area [R. 213, 143, 135].

Mr. Tooker of that office shortly thereafter came to Stein's place of business, saw the material, and under date of November 16 sent Stein a letter, signed by his superior, Major Zwick, giving directions to Stein to dear all the materials, including the insulated copper wire, through the Army Air Forces office [R. 145-147, 213-215].

Gov. Ex. 6, R. 81]. Stein was told not to sell or distribute any of the materials until all the materials could be analyzed by the Army Air Forces [R. 144, 213]. Thereafter Stein cooperated with the office of Army Air Forces in the handling of the materials—including the copper wire [R. 147, 138]. He obtained clearance in the making of the sales of the material by following the procedure outlined to him by that agency [R. 136-217].

Under this procedure Stein promoted his sales by a series of sales letters sent to prospective purchasers [Gov. Ex. 3, R. 301; Deft. Ex. B, R. 307; Deft. Ex. C, R. 309]. In these letters there was the specific statement that priorities were not required for the copper wire purchase as the material had been cleared through the Army Air Forces. The sales made by Stein of copper wire covered a period from November 19, 1942 (three days after Major Zwick's letter of instructions [R. 81]), until September 30, 1943, immediately before the filing of the Information in this case on October 4, 1943 [Deft. Ex. I, R. 326]. Complete and exact records were kept of all transactions in regular books of account of Stein [R. 228]. The records were openly exhibited and made available to Government investigators. These revealed the name of the company to whom delivery of insulated copper wire was made, the address, the priority, quantity shipped, Stein's invoice number, and the date [R. 326]. Many of the deliveries were made to purchasers who furnished priority ratings higher than AA-5. In Government's Exhibit No. 4 [R. 303] is found the information which Stein freely furnished to the Government investigators revealing the information as to the deliveries made by Stein.

Stein delivered the copper wire to various other purchasers without receiving from the purchasers an order "bearing the appropriate allocation classification and purchaser's symbol (pursuant to Priorities Regulation No. 10), and bearing a preference rating of AA-5 or higher." (General Preference Order M-9-a, as amended October 30, 1942; 7 FR 5980, 8825.) Note, however, that Priorities Regulation No. 10 was revoked on November 5, 1942 (7 FR 9028) which was approximately one month prior to the first alleged wrongful delivery of copper wire by Stein. (See discussion hereinafter under Point D-(1).)

On March 17, 1943, Mr. Burdge of the Compliance Division of WPB, came to Stein's place of business, asked for and received records of Stein's sales of copper wire. Notwithstanding complete information given by Stein disclosing his sales and manner of making through clearance with the Army Air Force, no notice or warning of any kind was sent to Stein. He continued thereafter to make sales in the same manner as theretofore, until the Information was filed in this case [R. 89, 191, 198, 234; Gov. Ex. 4, R. 303].

Stein testified as a witness in his own behalf. Numerous other witnesses also testified and documentary evidence was introduced. The *sole issue* to which the evidence was directed concerned the alleged "wilfulness" of Stein. It was stipulated or not contested, that the sales had been made by Stein to purchasers without procuring from said purchasers an order bearing the allocation classification, purchaser's symbol and preference rating of AA-5 or higher [e.g., R. 96, 100, 102, 106, 107].

The Information filed October 4, 1943, against Stein, charged him as a "*dealer in copper wire*," with violation of WPB, General Preference Order M-9-a, in making seventeen separate deliveries of various quantities of copper wire to different purchasers at different times, without receiving from the purchasers "*an allocation certificate duly indorsed by the Director General for Operations*" [R. 2, *et seq.*].

An Amended Information filed November 8, 1943, upon which the case was tried, charged Stein as a "*person engaged in the business of distributing wire mill products to industry or trade*," with the same deliveries, and in each Count charged:

"said delivery was not made to fill an order bearing the appropriate allocation classification and purchaser's symbol and bearing a preference rating of AA-5 or higher, or bearing any allocation classification, purchaser's symbol, or preference rating whatsoever." [R. 14, *et seq.*]

Stein entered a plea of not guilty to each of the Counts of the Amended Information [R. 28]. The case was then tried before a Jury, concluding with a verdict of not guilty on the first Count and a verdict of guilty against the defendant on the remaining fourteen Counts [R. 33]. The judgment and sentence of imprisonment and fine was entered February 21, 1944 [R. 36].

C. THE CIRCUIT COURT OF APPEALS' OPINIONS.

The First Opinion of the Circuit Court of Appeals filed June 30, 1945, reversed the judgment upon the sole ground that "the evidence, if there is any, from which an intentional or deliberate disregard of WPB regulations may be invoked, is too tenuous to be held substantial." [Ap-

pendix A.] That Opinion summarized the evidence in the following language:

“We have mentioned every piece of evidence which might in any way suggest willingness on appellant’s part to sell in violation of WPB regulations. We think the evidence reveals the situation where a man is confronted by confusing and overlapping jurisdictions. It describes a man who from discussions with various officials in good faith assumes that the Army Air Forces Procurement District is the controlling authority over the materials in his possession and who thereafter in good faith follows the procedure he understands is the proper one of clearing sales through that office.” [Appendix A.]

Thereafter, upon motion of the Government, the First Opinion was withdrawn and the decision reversing the judgment vacated. Thereafter, the Circuit Court handed down its Second Opinion and judgment which by this petition is sought to be reviewed.

The Second Opinion differs from the First Opinion as to the law in regard to the requirement of the proof of wilfulness. Briefly, the difference is this: The First Opinion was premised on want of affirmative proof by the Government that an act to be in “wilful” violation of the law must be an act done with a bad purpose. The Second Opinion is not premised on the burden of the Government to prove the criminal intent, but rather that a defendant is burdened to show a plausible excuse for having done the acts complained of. The language used in the Second Opinion:

“There is no compelling inference from the testimony regarding the purported authority of the AAF that appellant did not willingly violate the law. We

cannot say that the evidence negatives the suggestion that appellant was seeking plausible excuses for making the sales in the absence of legal authority to make them." [R. 362.]

Thus it appears that the conviction of Petitioner has been upheld by the Circuit Court of Appeals on the somewhat unusual basis that defendant failed to demonstrate that his excuses were plausible. And this, notwithstanding the difficulties of determining precisely what the regulations permitted or condemned.

Those difficulties are not alone present in General Preference Order M-9-a, Sec. 933.2(c)(2) under which Stein was charged. M-9-a and that section itself is but one of many regulations to which a distributor of copper materials was subject.

D. WPB ORDERS AND REGULATIONS.

(1) M-9-a, §933.2(c)(2).

General Preference Order M-9-a, which Stein was informed against as having violated, from October 30, 1942, to March 4, 1943, provided in part as follows:

"(c)(2) . . . (a) No industrial supplier, mill supplier, plumbing supplier, or other person engaged in the business of distributing brass mill or wire mill products to industry or trade, shall deliver or cause to be delivered any brass mill product or wire mill product, unless such delivery is made to fill an order bearing the appropriate allocation classification and purchaser's symbol (pursuant to Priorities Regulation No. 10) and bearing a preference rating of AA-5 or higher." (Italics supplied.)

(a) *The Effect of Revocation of Priorities Regulation No. 10.*⁹

Priorities Regulation No. 10, referred to in M-9-a, was issued June 1, 1942 (7 FR 4198). It remained in effect until revoked on November 5, 1942 (7 FR 9028). The revocation of Priorities Regulation No. 10 was one of the steps taken by WPB in its entire reversal of procedure from what was the "Production Requirements Plan" to the "Controlled Materials Plan."¹⁰ Priorities Regulation No. 10 was therefore revoked before the time when Stein is charged with having committed the alleged wrongful acts. It was not again reinstated.

Notwithstanding this revocation of Priorities Regulation No. 10, the Amended Information [R. 14, *et seq.*] and the charge to the Jury [R. 277], included the requirement that deliveries of copper wire be made only upon receipt by the seller of a purchase order bearing the endorsement of an appropriate allocation classification and purchaser's symbol. Both of these requirements were revoked prior to the alleged offenses. Stein was therefore charged with failure to obtain endorsements on the purchase orders, which endorsements were not required by War Production Board regulations at either the time of sale or delivery by Stein.

⁹A chart comparing the Amended Information, Charge to the Jury and M-9-a is contained in Appendix D.

¹⁰Further explanation of these plans, their background and purpose, is contained in Appendix E to this Petition under the heading: "The Background of Regulations: from PRP to CMP."

(b) *The Jury Instructions Failed to Note the Revocation of Priorities Regulation No. 10.*

The Second Opinion correctly noted that the allocation classification and purchaser's symbol "had an existence of their own separate and distinct from a preference rating." [R. 349.] The Second Opinion also correctly stated that the trial court instructed the jury "without noticing the change made by the elimination of the regulations." [R. 349.] The Circuit Court of Appeals construed this instruction to the jury as not being prejudicial to the Petitioner. But there was constitutionally hurtful prejudice in two respects. One, in being informed against and convicted on elements of a crime not present in the law. Two, in clouding the issue of wilfulness, since it may well make a substantial difference in determining criminal intent whether an alleged violator failed to perform in three respects or only in one.

(c) *Conviction Reversed as to Counts 15, 16 and 17 Because of March 4, 1943, Amendment to M-9-a.*

The sales made by Stein in Counts 15, 16 and 17, occurred after March 4, 1943, when Priorities Regulation M-9-a was itself amended. As to these Counts, the Second Opinion correctly held that no jury instruction covering the governing law as it existed at that time, was given, and for that reason the judgment of conviction as to Counts 15, 16 and 17 must be reversed.

**(2) Uncertainty and Ambiguity of Orders and Regulations
as Applied to Transactions in This Case.**

For a business man to determine whether or under what circumstances he may sell copper wire, he must look to regulations other than General Preference Order M-9-a, Sec. 933.2(c)(2):

(1) *Section 933.2(b)(1) of General Preference Order M-9-a.* He is immediately confronted with Section 933.2(b)(1), under which a dealer in "copper" may deliver copper, not upon receipt of allocation classification, purchaser's symbol and priority rating, but upon receipt of an "allocation classification duly issued by the Director General for Operations." (Parenthetically, it may be pointed out that the Information [R. 2, *et seq.*] was drawn in the wording of this Section 933.2(b)(1) of WPB Regulation M-9-a.)

(2) *Priorities Regulation No. 13.*¹¹ He must look to Priorities Regulation No. 13 to determine if he is making a sale thereunder, for insulated copper wire is one of the materials governed thereby. If he is governed by Priorities Regulation No. 13, then to some classes of purchasers he may sell upon a priority rating of AA-5 or higher, and to other classes, without any priority.

The sales charged in Counts 5, 6, 7 and 9, were at least initially indeterminable as to whether they were governed by those provisions of Priorities Regulation No. 13 that permitted sales to be made without a priority. One was a sale to a class of "wholesale dealers who sell the material in the form held by holder." Three were

¹¹Priorities Regulation 13 (7 FR 7523) is reprinted in Appendix F.

sales of less than \$100.00, which could be construed to come within War Production Board Release No. WPB-1489, issued July 7, 1942 (C. C. H., War Law Serv., par. 3092.10), reading in part: .

“5. Q. To whom can ‘special Sales’ of ‘War Materials’ be made? A. (d) In individual lots of an aggregate price of less than \$100.00.”

(3) *Priorities Regulation No. 1.*¹² In Priorities Regulation No. 1 he is notified that there is legal compulsion to accept and fill defense orders.

During the applicable times, Priorities Regulation No. 1 required the compulsory acceptance and fulfillment of Defense Orders:

“Compulsory acceptance of defense and other rated orders. Defense Orders for any material and all other purchase orders bearing preference ratings, including both A and B ratings (hereinafter called ‘other rated orders’), must be accepted and filled in preference to any other contracts or purchase orders for such material, . . .” (Sec. 944.2, Priorities Regulation No. 1, 6 FR 6681, December 24, 1941.)

The evidence on some of the Counts reveals that the defendant Stein sold to purchasers who were operating under a preference rating of A-10, or were purchasing as a Defense Order [as to Count 2, R. 99; as to Count 3, R. 100; as to Count 5, R. 101; as to Count 6, R. 101; as to Count 7, R. 108], and hence these sales may have been compulsory orders under Priorities Regulation No. 1.

¹²⁶ FR 6681.

E. CONGRESSIONAL LEGISLATION AND ADMINISTRATIVE "LEGISLATION" COMPARED.

Crystal-clear formulae for action may well be impossible to prescribe in every one of the multitudinous regulations that come from the grist mill of an executive agency responsible for production of goods for a total war. We acknowledge that clarity is for practical purposes a matter of degree.

But the judicial requirement for clarity may well vary with the instrumentality of government doing the legislating. *This Court has not expressed its views concerning the required definiteness of administrative "legislation,"* although it has done so respecting Congressional and State legislation. Important distinctions between them can and perhaps should be made. Congress is burdened with the necessity for political compromise—an administrative agency is not so burdened. Congress has neither the means nor the time to make detailed inquiry necessary to perform the regulatory function in any complicated sphere of our national economy; whereas, the administrative agency is given precisely such responsibility. The Second War Powers Act is a splendid illustration. The Act is the skeleton, the administrative agency fills in the details.

The judicial requirement for clarity may well vary in another respect. It may vary with the enforcement procedure employed. If the purpose be to enforce compliance of the regulation by the issuance of a suspension order within the agency itself,¹⁸ then the clarity need only be enough to constitute a general warning that the spirit

¹⁸For example, *L. P. Steuart & Bros. v. Bowles*, 322 U. S. 398 (1944).

of the regulation is violated. In such a procedure, the liberty of the individual is not at stake. If, however, the purpose be to prosecute criminally an individual for a wilful violation of a regulation, then a far greater degree of clarity should be required—a degree of clarity not present in Stein's prosecution.

There were within the War Production Board agency itself, ample methods of securing compliance with its regulations. Chief among these was the suspension order.¹⁴ We urge that the Court may consider that the degree of definiteness of the regulations to ground the valid issuance of a suspension order may well fall short of the degree of definiteness in the same regulation required to sustain a conviction. Compliance procedures within the agency do not, as does a criminal prosecution, subject the individual to the loss of his liberty.

A criminal prosecution subjects the individual, *eo instantे*, to a test of his liberty. A compliance procedure within the agency tests the regulation, and if favorable to the agency, culminates in a specific order, directed to a specific individual, to do or refrain from doing specific acts. Thereafter a violation is clear cut.

F. QUESTION PRESENTED IS OF GREAT PUBLIC INTEREST.

Regardless of the interest of the Petitioner, it is submitted that under these circumstances a review of the issues of this case and a determination of the law are matters of greatest public concern. Equally, during the era of reconversion to peace as during that of conversion to war and war production, and the period of administra-

¹⁴O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. L. Rev. (1944).

tive controlled economy which is current, and which it is of prime importance for the Supreme Court to set the standards of certainty and clarity in promulgating administrative production regulations and the requisite criminal intent to sustain a conviction for their violation.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

- (1) In affirming the judgment and sentences of the District Court as to Counts 2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14.
- (2) In upholding the constitutionality of War Production Board General Preference Order M-9-a, issued pursuant to the Second War Powers Act.
- (3) In failing to find error in the instructions of the District Court.
- (4) In holding that the prosecution sustained its burden of proof on the issue of wilfulness sufficient to support a verdict of guilty.
- (5) In failing to order a new trial.
- (6) In failing to hold that the WPB orders and regulations applicable to the transactions involved in this prosecution were so uncertain and vague as to constitute want of due process sufficient to be a basis for criminal prosecution.
- (7) In failing to hold that certain rulings relating to the admission of evidence were error. These errors are subordinate to the major errors and are not here urged as a basis for granting the petition.¹⁵

¹⁵Appendix F, attached, is a discussion of certain errors of the Circuit Court in its opinion, here sought to be reversed.

Reasons for Granting the Petition.

The Second War Powers Act makes it a crime where any person "wilfully performs any act prohibited, or wilfully fails to perform any act required by, any . . . rule, regulation, or order" promulgated by the President, or any agency established thereunder. To govern the production economy, the President, pursuant to authority granted him under the Second War Powers Act, set up appropriate agencies. The War Production Board, successor in aid of production control, to Supply Priorities and Allocation Board, and Office of Production Management, was established by executive order as the principal agency to control the nation's production.¹⁶

Numerous orders and regulations of varying types were issued by WPB to govern production, distribution and use of commodities from raw to finished product. The whole body of these orders and regulations in their entirety is the explication of the Second War Powers Act—they constitute in effect a body of "statutory law" defining and prescribing methods of production, distribution and use of critical materials.

To business men governed by the War Production Board, no single order stands alone, for each order must be examined with all others to determine permissive or compulsory courses of action. Furthermore, the controls, like the war of which they are a part, are changing and volatile. Their chief purpose is to secure goods for war and to further and speed the movement and use of goods in appropriate production channels.

¹⁶Ex. Order No. 9024, 7 FR 329 (1942).

Government is not here engaging in its more traditional activity as arbitrator or referee. Government is here essentially ordering and directing the activities of citizens and business men in our whole production economy.

The WPB did not afford business men a procedure for obtaining a binding interpretation or clarification of its regulations, although such procedure cannot be inimical to wartime activity. It is to be noted that the Office of Price Administration makes it available.¹⁷ Yet the WPB has available to itself administrative procedure for accomplishing action through directives or of correcting improper action through compliance procedures within the agency itself.¹⁸ No intra agency procedures were followed or attempted in this case and there was not available to Stein any method for securing legally binding interpretative instructions.

This case at once affords opportunity, and shows the necessity, for the Supreme Court to determine the standards of certainty and clarity required where orders and regulations in such a dynamic program are involved. While the national interest to secure maximum production is of paramount importance, yet the methods used to aid such interest must not invade the individual's constitu-

¹⁷Revised Procedural Regulation No. 1—Procedure for Issuance, Adjustment, Amendment, Protest and Interpretations of Maximum Price Regulations (issued November 2, 1942, 7 FR 8961).

¹⁸O'Brian and Fleischmann, The War Production Board Administrative Policies and Procedures, 13 Geo. Wash. L. Rev. 1, 46 (1944).

tional rights, especially where administrative procedures and civil injunction can be forcibly, quickly and effectively employed in aid of the nation's paramount interest. The interest of Government to secure production, and the civil remedies available (intra agency compliances as well as court injunction) to accomplish these objectives, are to be weighed against the interests of individuals who should not be "required at peril of life, liberty and property to speculate as to penal statutes."¹⁰

Petitioner, once exonerated of any crime, stands before this court, his liberty jeopardized by a decision predicated upon an opinion which in no wise informs him as to what new consideration, or facts, or law, transforms acts once found to be innocent of criminal intent, to be venal and wilful. No reasons are assigned as to why the same three judges "changed their minds." No pressure by government in an attempt to bolster its insistence that a thoroughly confusing and partially revoked mass of "administrative legislation" can be made the basis of a criminal prosecution and conviction, can justify the Circuit Court's revised position. The anxiety of the government—and the WPB—to prosecute and to sustain a conviction is understandable. But, we most respectfully insist, the action of the court sought to be reviewed is not. Petitioner, with his liberty in jeopardy, prays this court's aid and protection in the most fundamental of rights—his right to due process under our law.

¹⁰*Lanzetta v. New Jersey*, 306 U. S. 451 (1939).

Conclusion.

We submit that consideration of the Second Opinion of the Circuit Court of Appeals amply demonstrates the need for a review in this case of the degree of definiteness which should be required in orders and regulations of a government agency in order to ground a criminal prosecution, the exactness required in a criminal prosecution and charge to a jury, as well as the degree of proof of wilfulness to sustain a conviction.

No attack is here made on the constitutionality of the Second War Powers Act. While the constitutionality of the Act is and was presumed at all stages of the prosecution, *the constitutionality of the orders and regulations issued thereunder and which pertain to the transactions here involved, when made the basis of a criminal charge*, were and are put in issue. Having in mind the constitutional issue thus raised, the defendant could not and should not have been convicted.

Even if one felt that acts such as were committed by Stein, should be punished, nevertheless "the evidence reveals the situation where a man is confronted by confusing and overlapping jurisdictions. It describes a man who from discussions with various officials in good faith assumes that the Army Air Forces Procurement District is the controlling authority over the materials in his possession and who thereafter in good faith follows the procedure he understands is the proper one of clearing sales through that office." (First Opinion.) That which Stein did was not defined as a crime by a law made plain to "men of common intelligence."

The manifest uncertainties in WPB orders and regulations as applied in the instant case, are given pointed

emphasis by the ineptitude of WPB itself, the prosecution's filing of an Information under a different provision of the regulation than that under which Stein was found guilty, the prosecution's filing of an Amended Information charging elements of a violation theretofore revoked, the errors in the charge to the jury, the inconsistency of the verdict on precisely similar facts, and the reversal by the Circuit Court of Appeals of its First Opinion—these all illustrate the uncertainties and consequent need for consideration and decision by this Court of the essential constitutional issues involved.

There is the gravest danger, not only to unintentional law-breakers, but to the public generally, in defining an offense of this character in such vague terms that in times of stress and public excitement, business men, encouraged to produce and aid production, may be subjected to criminal prosecution for actions which had but recently been left entirely to the free, unregulated exercise of the right to buy, sell and use goods. The correct and constitutional construction of the Second War Powers Act, and of the proper boundaries of "legislation" by executive agencies, therefore presents an issue of great public importance which we believe merits the consideration of this Court. Wherefore, we urge that the petition for writ of certiorari be granted.

Respectfully submitted,

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